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Brief of Helm & Bruce for Def'd.

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Supreme Court of the United States.

OCTOBER TERM, 1897.

LOUISVILLE WATER COMPANY, PLAINTIFF IN ERROR,

vs.

COMMONWEALTH OF KENTUCKY, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

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IN THE

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STATEMENT.

Suit was brought by the Commonwealth of Kentucky and H. A. Bell, sheriff, against the Louisville Water Company in January, 1891, seeking to collect from the water company taxes due the State for the year 1886. The property had not been assessed in 1886, but was subsequently, in 1891, reported by the sheriff as "omitted property," and was thereupon assessed as of January 10, 1886, and this action was brought to collect the taxes due upon that assessment.

At the time this assessment was made and this action instituted, January, 1891, there was in effect a general revenue statute, approved May 17, 1886, and which is commonly known in the legislative and judicial history of Ken-

tucky as the "Hewitt act" (General Statutes of Kentucky, editions of 1887 and later, chapter 92); but the tax involved in this action, being the tax for the year 1886, had been imposed as of the 10th of January of that year under and by the law in force prior to the adoption of the Hewitt act of May 17, 1886, and, accordingly, the amount claimed as taxes due from the water company for the year 1886 was ascertained according to the rate of taxation which prevailed on January 10, 1886, which was 51½ cents on each $100 of value (Rec., p. 2), though the act of May 17, 1886, imposed a tax rate of 47 cents on each $100 of value (Appendix I), and the tax rate in force for the year 1891, the year the assessment was actually made by the sheriff, was 42 cents on the $100 of value. (Appendix II.)

The defendant company made a number of defenses to the action.

Among other defenses, it claimed that the Hewitt act of May 17, 1886, had repealed all prior taxing statutes, and hence had released the defendant from its obligation to pay the tax of 1886, if any such obligation had ever existed. To this the court of appeals of Kentucky responded by calling attention to the fact that this Hewitt act "expressly excepted all obligations incurred under existing laws from repeal." (Rec., p. 27.)

Defendant also contended that by an act of the legislature of Kentucky, approved April 22, 1882, and accepted by defendant, its property had been exempted from taxation, and that thereby a contract of exemption had been made with the State, and that defendant's property was therefore not subject to taxation in 1886. Upon this question the court of appeals simply held that this exempting statute had been held to be unconstitutional by the court of appeals in the case of Clark, sheriff, *vs.* The Louisville water company, 90 Ky., 515, and hence this defense was not maintainable. (Rec., p. 27.)

Other defenses were made, which it is not material now

to mention, because they do not present a Federal question, but all of which were overruled by the court of appeals, and the judgment of the lower court in favor of the State for the amount of the tax was affirmed; and the water company has now brought the case to this Court by writ of error.

The plaintiff in error is the same corporation which was plaintiff in error in the case of The Louisville Water Company *vs.* Commonwealth of Kentucky, heretofore decided by this Court, the opinion being reported in 143 U. S., 1. There is this difference, however, between that case and this one: That case involved the tax for the year 1887, the year subsequent to the passage of the Hewitt act, while the present case involves the tax of 1886, which accrued prior to the passage of the Hewitt act; and the point upon which this Court decided the case involving the tax of 1887 was that the Hewitt act by its terms repealed all exemptions from taxation, including the exemption of the Louisville Water Company, and that the legislature had the lawful power to make the repeal; so that there was therefore no ground for the company's refusal to pay the tax of 1887.

The water company attempted to make a Federal question by its answer in the State court as follows: After having stated with great detail the passage of the exempting statute of April 22, 1882, and the company's acceptance thereof, and performance of obligations thereunder, etc., it then made the following statement:

"And this defendant, further answering, says that the alleged and pretended assessment set up and asserted in the petition in this action have for their authority an act of the General Assembly of the Commonwealth of Kentucky approved upon the 17th day of May, 1886, and entitled An act to amend the revenue laws of the Commonwealth of Kentucky, and said pretended assessment and levy asserted and set up in the petition and sought to be enforced herein has no other countenance or authority than the said act hereinbefore referred to as approved the 17th day of May, 1886.

"And the defendant says that the said act of May 17,

1886, furnishes the only authority for the pretended and alleged assessment and levy set up and asserted in the petition in this action.

"And this defendant, relying upon its said contract as hereinbefore set out and as evidenced by the act hereinbefore referred to as approved on the 22nd day of April, 1882, avers and says that in so far as the said act approved on the 17th day of May, 1886, seeks to authorize, justify, or countenance an assessment of or levy of a taxation upon the property of this defendant that said act approved May 17, 1886, is in violation of the Constitution of the United States, for the reason that the same impairs the obligation of the contract of the Commonwealth of Kentucky hereinbefore set out by the act hereinbefore referred to as approved April 22, 1882." (Rec., p. 11.)

Plaintiff in error makes the following assignment of errors:

"The Louisville Water Company, plaintiff in error, comes and complains of the judgment rendered herein by the court of appeals of the Commonwealth of Kentucky. The said court had jurisdiction of the subject-matter of the litigation and is the highest court in said Commonwealth having such jurisdiction and its said judgment is final, and for cause of complaint said plaintiff in error, The Louisville Water Company, assigns errors as follows:

"First. The court of appeals errred in affirming the judgment of the Jefferson circuit court, law and equity division, heretofore known and styled the Louisville law and equity court.

"Second. The court of appeals erred in adjudging that the properties of the plaintiff in error were subject to taxation by the Commonwealth of Kentucky at any time between the 22d day of April, 1882, and the 15th of September, 1886, or that the properties of the plaintiff in error could be so subjected without violating the Constitution of the United States.

"Third. The court of appeals erred in failing and refusing to reverse the judgment of the Jefferson circuit court, law and equity division, heretofore known and styled the Louisville law and equity court, and in failing to adjudge that the properties of the defendant in error were exempt from liability to taxation by the Commonwealth of Kentucky prior

to the repeal on the 15th day of September, 1886, by an act entitled 'An act to amend the revenue laws of the Commonwealth of Kentucky,' approved May 17, 1886, of the provisions of an act approved April 22, 1882, entitled 'An act to amend the charter of the Louisville Water Company.'

"Fourth. The court of appeals erred in adjudging that the act of the General Assembly of the Commonwealth of Kentucky approved on April 22, 1882, entitled 'An act to amend the charter of the Louisville Water Company,' after being accepted by the plaintiff in error and its conditions performed by the plaintiff in error in the supplying of water for public purposes to the city of Louisville free of charge up to September 16, 1886, did not constitute a legal, valid, and enforcible obligation and contract between the Commonwealth of Kentucky and the plaintiff in error.

"Fifth. The court of appeals erred in adjudging that the said contract was not supported by a legal and valuable consideration upon the part of the plaintiff in error.

"Sixth. The court of appeals erred in adjudging that the authority exercised under, in the name, and for the benefit of the Commonwealth of Kentucky in the assessment of the property of the plaintiff in error for taxation and in attempting to enforce the collection of such taxes does not impair the obligation of the contract involved in the acceptance by the plaintiff in error of the provisions of the act approved April 22, 1882."

It will be seen that the different assignments of error really constitute but two causes of complaint. One is that the court of appeals of Kentucky erred in adjudging that the act of exemption, passed the 22d of April, 1882, did not constitute a valid contract between the Commonwealth and the plaintiff in error. The other is that the court erred in adjudging that the authority exercised under, in the name, and for the benefit of the Commonwealth of Kentucky in the assessment of the property of the plaintiff in error for taxation and in attempting to enforce the collection of such taxes does not impair the obligation of the contract.

It is right difficult to understand from the assignment of errors whether the plaintiff in error means to insist that the

law-making department of the Government had passed any law repealing or attempting to repeal the act of 1882 in so far as the particular tax is concerned. It is almost as difficult to determine this question from the brief as it is from the assignment of errors. We shall, however, discuss both phases of the question. Either the act of 1882 was or it was not repealed, so far as this tax is concerned, by the act of 1886. If it was not repealed in whole or in part, then no Federal question is presented. If it was repealed, then, as decided by this Court in the case of The Louisville Water Company *vs.* Commonwealth of Kentucky, 143 U. S., 1, there was power of repeal, and this question having been once deliberately adjudicated by this Court between the same parties is now conclusive as between them and the judgment should be affirmed.

We have heretofore argued a motion to dismiss the writ of error in this case upon the ground that no Federal question was presented. That motion was not acted upon, but the question was reserved for the final hearing. We shall, therefore, present our views upon this question first.

We shall then consider the question of repeal and then the question of the existence of the alleged contract.

ARGUMENT ON MOTION TO DISMISS.

By the allegations of the answer just quoted the defendant company has made an attempt to raise a Federal question on the record. As said by this Court in Hamblin *vs.* Western Land Company, 147 U. S., 532, "A real and not a fictitious Federal question is essential to the jurisdiction of this Court over the judgments of State courts." Let us then look carefully at the question attempted to be stated in this answer.

As to the allegation that the act of May 17, 1886, furnishes the only authority for the "*levy*" of the *tax* (as distinguished from the *assessment* of the *property*) the allegation is

not true, as the record and the acts above referred to plainly show. The act of May 17, 1886, does not attempt to make a levy of taxes for any time preceding the taking effect of the act. The levy of taxes for such antecedent time was provided for by other acts, the rate of taxation being fixed by them, and the act of May 17, 1886, simply provided that nothing therein contained should operate as a repeal of any obligations or penalties incurred under any existing law (article 12, section 7, Appendix 1); and although it was insisted in the court of appeals by plaintiff in error that this act had discharged all pre-existing obligations (if any there was) to pay this tax, levied as of January 10, 1886, yet the court in its opinion denied the truth of this proposition, simply calling attention, with reference to the act, to the fact that "it expressly excepted all obligations incurred under existing laws from repeal," and saying, "It is therefore clear that if appellant had become liable for the tax of 1886, the act *supra* did not release it from such liability" (Rec., p. 27); and while the court says it does not agree with appellant that the act is only prospective, yet it is plain that the court there refers to the matter of *assessing* property which had been omitted in the preceding years and not to the matter of levying a tax for preceding years; for the amount of tax for which judgment was given was, as heretofore stated, according to the rate in force for the year 1886, prior to the adoption of the act of May 17, 1886, viz., 51½ cents on the $100; whereas the rate fixed by the said act of 1886 was 47 cents upon the $100, and the rate in force in 1891, when the assessment was actually made, was 42 cents on the $100. We repeat, therefore, that the statement in the answer, to the effect that the act of May 17, 1886, furnishes the only authority for the *levy* of the tax asserted in the petition, is plainly not true; and no such authority was asserted or found, either by the Commonwealth, as plaintiff in the action, or by the court of appeals, in sustaining the tax.

Let us consider, then, the other allegation, to wit, that

this act of May 17, 1886, furnishes the only authority for the *assessment* of the property set up in the petition, and let us see what is the effect of this allegation, if true, in the matter of raising a Federal question. It is true that this act provided that the sheriff should report for assessment any property which had been omitted, and that the court construed this to apply to years preceding the adoption of the act as well as to succeeding years. This resulted simply from the fact that the act of May 17, 1886, was a general law, intended to cover the whole subject of revenue and taxation, intended to make a complete law for the State upon that subject, and unless the State was willing to release all obligations to pay taxes which had theretofore been levied upon property which had been omitted from the assessment-rolls by the officers whose duty it was to report the same it was necessary in adopting this new general law to make provision for assessing this previously omitted property. There had been a similar provision in the preceding general law, as it had existed since 1873 (long prior to the adoption of the exemption statute of 1882), for which the act of May 17, 1886, was intended as a substitute, this provision for the reporting of property by the sheriff being substantially a mere repetition of a similar provision in the preceding law.

This is conceded by plaintiff in error on page 5 of its brief.

But even if the act of 1886 in reference to assessing omitted property was not in substance the same as the preceding laws, still we insist that no Federal question is raised by the action of the sheriff in assessing the property of the Louisville Water Company or by the action of the court of appeals of Kentucky in upholding this proceeding on the part of the sheriff. We have already shown that the tax in question was not *levied* under the act of May 17, 1886, upon which plaintiff in error relies as impairing the obligation of the contract contained in the act of April 22, 1882. That tax had been *imposed* by pre-existing law. The act of May

17, 1886, did not purport to repeal the act of exemption of April 22, 1882, upon which plaintiff in error relies as a contract, so far as the time *preceding* May 17, 1886, was concerned. It did purport to repeal this exemption, with all other similar exemptions, for the time *succeeding* the passage of the latter act, and to the extent that it did purport to make this repeal this Court has upheld it as a valid exercise of legislative power (Louisville Water Company *vs.* Clark, 143 U. S., 1); but, as just stated, as to the period preceding the adoption of the act, it made no attempt to repeal the exemption, and therefore had no effect upon it one way or the other. It did not refer to it at all.

Clearly, therefore, it cannot be said that the act of May 17, 1886, impaired the obligation of the alleged contract contained in the act of April 22, 1882. It is impossible to understand how it can be said that a legislative act has impaired the obligation of a contract contained in a preceding statute when it makes no reference to the same, either expressly or by implication, either in general or specific terms.

But, as heretofore explained, the act of May 17, 1886, was a general revenue statute, and, among other things, it provided generally for the assessment by the sheriff of any property liable to taxation for preceding years, but which had been improperly omitted from the assessment books. It made no attempt whatever to alter the pre-existing laws which had provided what property should be liable to taxation. It did not purport to affect that question in any manner, and it did not in fact do so. It only provided in general terms for the assessment by a proper officer of property which had been liable and was liable to taxation under the pre-existing laws, but which had been improperly omitted. This was all that was done by the legislative department of the State.

But the sheriff, a ministerial officer, conceived that the property of the Louisville Water Company was liable for taxation under the laws as they existed prior to May 17,

1886. He conceived that the act of April 22, 1882, purporting to exempt the property of the Louisville Water Company from taxation, was unconstitutional, and therefore that that property was and always had been subject to taxation by the State, and that as it had not been assessed and as no taxes had been paid upon it since April 22, 1882, it ought to be reported and assessed for taxation, and accordingly he did assess the same, and a suit was brought in the name of the Commonwealth and of the sheriff jointly against the water company to recover the amount of the tax based on this assessment for the year 1886, and the lower court having given judgment in favor of the plaintiffs for the amount of the tax the court of appeals affirmed that judgment.

If any wrong has been done the Louisville Water Company in disregard of its alleged contract contained in the act of April 22, 1882, so far as the tax involved is concerned, it has been done by the sheriff, the ministerial officer, and by the judges of the courts, being the judicial officers of the State. *There has been absolutely no attempt on the part of the legislative department of the State to interfere with this alleged contract.* Such being the case, no Federal question is presented.

It cannot be said that the validity of the statute of May 17, 1886, is in any sense drawn in question. As to the right of the legislature of a State to direct that property liable to taxation under pre-existing laws, but which had been omitted from the assessment books by accident or otherwise, should be assessed so that the taxes might be collected upon the same, this cannot be doubted, and to deny this right and in that way attempt to raise a Federal question is to do exactly what this Court, in the case already cited, said could not be done. "The bare averment of a Federal question is not in all cases sufficient. It must not be wholly without foundation." (Hamblin *vs.* Western Land Company, 147 U. S., 532.)

It may be said, however, that the action of the sheriff in assessing this property for taxation upon the idea that the exempting statute was unconstitutional, supported and maintained by the decision of the court of appeals, was "an authority exercised under the State," and that this has been drawn in question on the ground of being repugnant to the Constitution of the United States, and that, as the decision of the State court was in favor of the validity of such authority, therefore a Federal question is presented.

But this manifestly cannot be true. Of course, every ministerial officer acts only by virtue of an authority under the State, and so every judicial officer acts only by virtue of an authority under the State, and this authority is always conferred by legislative action either in the form of a constitution or statute, and this may be a new constitution or a new revision of the laws adopted after the passage of some act which is claimed to constitute a contract. Thus the court of appeals which gave judgment for this tax was a court created by a constitution adopted in 1891, long after the passage of the exemption statute of 1882, and it may be said that the only authority for the existence of the court or of the sheriff who made the assessment was the constitution of 1891, though it did not affect the question of defendant's liability or exemption from liability to taxation. Yet it is perfectly evident, and this Court has often so held, that the fact that a party complains of the action of a ministerial officer or of a court as being in violation of a contract right does not raise a Federal question. The mere action of a ministerial officer or a judicial officer *under a statute which is itself valid* will not be sufficient to raise such a question.

In New Orleans Water Works *vs.* Louisiana Sugar Company, 125 U. S., 30, this Court said:

"In order to come within the provisions of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but

it must have been impaired by a law of the State. The prohibition is aimed at the legislative power of the State and not at the decisions of its courts or the acts of administrative or executive boards or officers or the doings of corporations or individuals."

The Court conceded in the case just cited that legislative authority might be exerted otherwise than by the immediate action of the legislature of the State; thus, that the legislature might authorize a municipal council to exercise certain legislative functions, as, for example, in the levying of municipal taxes, and that where this should be the case the action of the council in making such a levy would be regarded as the enactment of a law by the State. It also recognized the fact that the enactment of what purported to be laws by the Confederate government, and which were given the effect of laws in the several States of the Confederacy, were enactments of laws within the meaning of the Federal Constitution; but while the case then immediately before the Court was one in which a municipal ordinance of the city of New Orleans was attacked as being in contravention of an alleged contract right, yet the Court said that the action of the city council in the matter complained of was *not legislative in its character*, but was entirely ministerial, and therefore no Federal question was thereby presented. In that case a legislative act of the State of Louisiana had granted to the New Orleans water works the exclusive right to furnish water to the city of New Orleans, providing, however, that nothing therein should "be so construed as to prevent the city council from granting to any person or persons contiguous to the river the privilege of laying pipes to the river exclusively for his or their own use." Subsequently the city council, by the ordinance complained of, did grant to the Louisiana Sugar Company the right to lay pipes to the river for its own use, it being contended that the property of this company was "contiguous to the river." It was insisted by the water company that this property was not contiguous to

the river, and that therefore this ordinance was in violation of the contract between the water company and the State as contained in the legislative act referred to; but this Court held that the city council, although exercising authority under the State (for all municipal councils do this), and although acting by virtue of the authority granted to it by the legislative act which had created the contract, yet did nothing more than determine for itself that this property of the sugar company did lie contiguous to the river, and that, as this was *a purely ministerial action and in no sense legislative in its character*, therefore, although the action was taken by a body which in many respects had legislative powers, yet the action complained of was not a legislative action, and raised no Federal question.

So in the case at bar. So far as the legislative act of May 17, 1886, is concerned, it certainly attempted to do nothing except what the legislature had power to do, viz., to direct its officers to assess any property which had been liable to taxation under pre-existing laws, but which had been improperly omitted from the assessment books, and the action of the sheriff in determining for himself that the property of the Louisville Water Company was liable to taxation under the law as it existed prior to May 17, 1886, and the action of the courts in upholding this action on the part of the sheriff were, of course, not legislative acts in any sense of the word, and therefore do not present any Federal question.

We suppose the principle to which we have referred, to wit, the necessity for *legislative* action by the State in order to raise a Federal question based on contract rights, is so thoroughly understood as not to need an extensive citation of authorities. We may, however, refer to a very late case on the same subject in Central Land Company *vs.* Laidley, 159 U. S., 109, where this Court said:

"In order to come within the provision of the Constitution of the United States, which declares that no State shall

pass any law impairing the obligations of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by some act of the legislative power of the State and not by a decision of its judicial department only."

We submit that the motion to dismiss the writ should be sustained.

REPEAL.

We do not believe there is any merit in the claim that the act of 1886 repealed the act of 1882, exempting the water company from taxation, so far as the tax in controversy is concerned: but if that be assumed, which must be done before this Court can take jurisdiction, we maintain that there was power to repeal. This very question was decided by this Court in the case of The Water Company *vs.* Kentucky, 143 U. S., 1, the general act of 1856, reserving the power of amendment or repeal, being read by this Court into the act of exemption. The power of repeal being thus reserved, it being a part of the act of exemption that it might be at any time withdrawn, the company at all times held the exemption subject to the reserved right of the State; but it is claimed that the State had no right to do so unjust a thing as to make the repeal operate retroactively, because it is said water had been furnished to the city free of charge for about four months and a half of 1886 when the revenue act of 1886, claimed to operate as a repeal, was passed. Whether the repeal operates justly or unjustly, we submit, is not a question for this Court. If the *power* of repeal exists, this Court will hold that the Constitution of the United States affords no protection and will leave the question of whether act of repeal operates prospectively only or both prospectively and retrospectively to the State court.

But no injustice has been done:

1. Because if the furnishing of water free of charge to the city was the consideration for the repeal, then when the con-

sideration was withdrawn the water company had a perfectly good claim against the city for the water furnished for the year 1886.

II. But as the city owned all the stock of the water company (Rec., p. 7) it is, of course, folly to say that the furnishing of water to the city free of charge could have been the consideration for the exemption, because, of course, no one can be made a penny richer or poorer by paying to himself out of his own funds, whether the payment be a dollar or a million dollars; and this is the view expressed by the court of appeals.

III.

THE ACT OF EXEMPTION WAS NOT A CONTRACT.

But if the Court should disagree with us on the questions heretofore discussed, then we propose to show the Court, as we feel confident we can do, that the act of 1882 *was not a contract*, either in form or in substance.

We propose now, under the present heading of our argument, to consider the proposition of whether the act of 1882 was in form or substance a contract.

Two constructions of the terms of this act, as showing the meaning of the legislature and the inducement which moved it to grant the exemption, have been contended for.

Counsel for the water company contend that it is simply a contract between the State and the Louisville Water Company as a private corporation, whereby the State, recognizing its duty to furnish water for fire protection to the city free of charge, agreed with the water company that if it would furnish this to the city free of charge the State would release it from the payment of taxes.

We, as counsel for the sheriff, contend that the act is simply an attempt on the part of the legislature to exempt the property *because it belonged to the city of Louisville.*

The question, which of these two constructions is correct, is, of course, very important. If the first be correct, then the act is at least in the form of a contract, and the serious questions will become those as to its validity and the questions heretofore discussed; but if the second construction, or, in other words, our construction, be correct, then manifestly there is no contract, and this Court has no jurisdiction to determine the question of the right of the State to grant an exemption to the property simply because it belongs to a municipality.

We do not see how there can be any doubt as to the view which the legislature took of the situation, nor as to what the terms of the act itself show to have been the reason which influenced the grant of exemption. For the convenience of the Court we will repeat the terms of the act. It is as follows:

1. "That it shall be the duty of the Louisville Water Company to furnish water to the public fire cisterns and public fire plugs or hydrants of the city of Louisville for fire protection free of charge."

2. "The sinking fund of the city of Louisville being the owner of the stock of the Louisville Water Company, and said water company by virtue thereof is the property of the city of Louisville, *therefore* the Louisville Water Company is hereby exempted from the payment of taxes of all kinds, of whatever character, State, municipal, and special." (Our italics.)

Thus, in the second section of the act wherein the exemption is granted, the legislature in express terms declares that the reason of the exemption is the fact that the property belonged to the city of Louisville. Counsel contend that because the first section directs the water company to furnish water for fire protection to the city of Louisville free of charge, therefore that must have been the consideration. They contend in effect that we must simply put together the two facts of furnishing water for fire protection, as re-

quired by the first section of the act, and the exemption from taxation, as granted by the second section, and must treat the one as the consideration of the other, and as thus showing an intent to form a contract with mutual obligations between the State and the water company, regardless of the reasons which the State has expressly given for its action, and which clearly show that it did not consider that it was forming a contract with the water company as a private corporation, but that it exempted it simply because it was understood to belong to the city of Louisville.

The direction to the water company to furnish water to the city for fire protection free of charge, as required by the first section, so far from supporting the idea of a contract, confirms the other view of the act. The language of the act is not the language of a contract, nor of a proposition for a contract, but is language which shows that the State regarded the property of the water company merely as the property of the city of Louisville, and regarded the payment by the city to the water company as a mere payment by the city to itself for the use of its own property, though it was a payment out of the general fund into the sinking fund of the city, and therefore directed that this transfer of funds from one department to the other should cease, inasmuch as by the same act the funds of the sinking fund were greatly increased by an exemption of three or four million dollars' worth of its property from taxation (the legislature supposing, of course, that the act of exemption was valid), the idea being to preserve to some extent the equilibrium between the two funds.

It seems, therefore, very clear, not only from the second section of the act, but also from the first and second sections taken together, that the legislature of the State in passing this act had no idea of making a contract with the water company, but that it regarded the water company as itself the property of the city of Louisville, and considered that it

was on that account alone a proper subject of exemption from taxation.

The fact that this was at least the view taken of the matter by the legislature is further supported by the fact that in granting the present charter of the city the water company was spoken of, as heretofore shown herein, as "an institution of the city;" and although this part of the charter was subsequently repealed and provision made that the city should pay the water company for water supplied by the latter, this was evidently for the purpose of maintaining the assets of the sinking fund of the city, the amendment being passed, not for the benefit of the water company, but solely for the purpose of preventing a decrease in the assets of the sinking fund, which it was considered proper to keep up.

Now, although we will presently show that this *could not* have been a contract under the facts that actually existed when it was passed, yet before reaching that point, have we not shown that it *was not* a contract when we have shown, as we have just attempted to do, that the legislature *did not so intend?*

In New Jersey *vs.* Yard, 95 U. S., 114, this Court, through Justice Miller, in speaking of legislative acts that were claimed to be contracts, said:

"The difficulty in this class of cases has always been to distinguish what is intended by the legislature to be an exercise of its ordinary legislative function in making laws, which, like other laws, are subject to its full control by future amendments and repeals, from what is intended to become a contract between the State and other parties when the terms of the statute have been accepted and acted upon by those parties. This has always been a very nice point; and when the supposed contract exists only in the form of a general statute doubts still recur after all our decisions on that class of questions."

Now, when the legislature shows clearly by its language that it is simply attempting to exercise a supposed power of exemption from taxation on the ground that the property exempted belongs to a city, and, further, in the language of command, directs that certain services shall be performed for this city by a corporation which it states to be the property of the city, can this corporation obey the command and then insist that it is a mere private corporation, and that it has treated this act as a proposition for a contract and has accepted it? We think it clear that this cannot be done; and as the act on its face showed clearly that it was intended as a command, in the exercise of a supposed right of command, and not as a contract or agreement, the water company had and has no right to treat it otherwise.

Furthermore, the ground on which it is held that the consideration for the grant of an exclusive privilege by the legislature will be held *adequate* by the courts, if it is *valid*, is that the *legislative judgment* having acted on a matter within the legislative province, this judgment will be held *conclusive* on the question of the adequacy of the consideration (Gordon *vs.* Winchester Building Association, 12 Bush., 114, cited with approval in Louisville Gas Company *vs.* Citizens' Gas Company, 115 U. S., 694). Therefore, when it affirmatively appears on the face of an act that the legislature has granted an exemption from taxation *on one particular specified ground*, and on no other, we do not see how any other can be treated as having been considered or as having been adjudged sufficient by the legislative judgment or as having formed the basis of any agreement between the State and a third party. When no consideration for the exemption is expressed, the courts will uphold it if *any* valid consideration can be found; but where the consideration is expressly stated, that, and that only, can be considered as having received the sanction of the legislative judgment.

But not only is the construction for which we have contended the only one which can be given to the terms of the

act, it is, moreover, the only view that could have been taken of the situation as it actually existed when this act was passed. It is impossible that a contract such as that contended for by counsel for the water company could have been made. Counsel contend that the State considered it to be its duty as a State to furnish water for fire protection to the city of Louisville free of charge, and that in order to perform this obligation to the city the State contracted with the Louisville Water Company, as a private corporation, to perform this service, and agreed in consideration therefor to exempt it from taxation.

The foundation of this argument is the State's *obligation to the city* and its desire to satisfy that obligation by doing something which would be of benefit to the city. But if the city owned the water company, then a payment to the water company by the city was but a payment to itself—a payment from one of its funds into another of its funds—and to be relieved from this was of no benefit to the city and could not be any discharge of the State's obligation to the city.

But it is said that this water company is owned by the sinking fund of the city of Louisville; that this is a separate corporation, the funds of which are charged with the payment of certain specified creditors of the city, and that it makes a great difference if the city ceases to pay the water company for water, for thus the funds of the sinking fund are reduced. But to whom does this make a difference? The difference is solely to the creditors of the city. The creditors whose debts are charged on the sinking fund may suffer (unless some compensation be otherwise made), while the general creditors may gain; but the city, which is liable to all of its creditors, neither gains nor loses one cent of its estate by a transfer of money from one of its funds to another of its funds.

But as the alleged obligation of the State which it is said now to be seeking to fulfill is an obligation *to the city*, it

must, in order to fulfill this obligation, do something which is of benefit to the city; and as relieving the city from the necessity of paying out one of its funds into another of its funds could not be of any benefit to the city, therefore this could not have been of any consideration for the State's action. Under such circumstances the only thing the State could do to benefit the city, and thus fulfill the State's obligation to the city, would be to relieve the city's property from taxation. And this release of its property from taxation was the sole benefit received by the city from the State; while the stopping of payments from the general fund to the sinking fund was of no benefit to the city, but was merely an evening up of the two funds, making some compensation to the general fund out of the sinking fund for the new increase in the assets of the sinking fund derived from the exemption of this property from taxation.

We say, therefore, that it conclusively appears from the terms of the act of the legislature that it attempted to exempt this property because it was the property of the city of Louisville, and not on the idea that it was exempting the property of a private corporation in consideration of its performing a duty which the State owed to the city, and that this is consistent with the view which the legislature had taken of this matter and upon which it had acted for nearly half a century before the act of 1882 was passed. And we say further that it conclusively appears from a consideration of the facts of the case that that which the State by the first section of the act of 1882 ordered to be done, to wit, that water should be furnished by the Louisville Water Company to the city of Louisville for fire protection free of charge, was no benefit or gain whatever to the city, and therefore could not have been considered by the State as any performance of its obligation to the city, and consequently could not have been any consideration for the State's granting an exemption from taxation to the Louisville Water Company.

And we call attention to the fact that this is the view

which has been taken of this act by the court of appeals of Kentucky (in the case of Clark *vs.* Water Company, 90 Ky., 515), a tribunal which is, of course, familiar with all of the parties to this transaction and fully understands the relation which they bear to each other. Even Judge Pryor, the dissenting judge, says in his dissenting opinion that he has no doubt that the ownership of the stock of the Louisville Water Company by the city of Louisville was the inducement to the exemption, and again says that he considers the tax-payers of Louisville as the real parties to this controversy. In other words, he bases his dissent on what he conceives to be an injustice to the tax-payers of Louisville, and not upon any idea of a violation of the contract rights of the Louisville Water Company. In dealing with this question the court in its opinion used this language:

"We think it evident that the furnishing of water by the company to the city for fire protection free of charge was not what induced the passage of the act. Its recitals, aside from the express statement in it of the reason, make this quite plain. It says: 'The sinking fund of the city of Louisville being *the owner of the stock of the Louisville Water Company, and said water company, by virtue thereof, is the property of the city of Louisville; therefore* the Louisville Water Company is hereby exempted from the payment of taxes of all kinds of whatever character, State, municipal, and special.'

"According to the legislative recital, the sinking fund of the city owns the entire stock of the water company. There is nothing in the record showing otherwise, and it must therefore be assumed to be true." (In the answer in the present action this is expressly averred to be true.) "While the sinking-fund department is a separate corporation from that of the city proper, yet it is merely the money-making branch of the municipal government. It has charge of its funds and its investments, whether in bank, railroad, water company stocks, or other valuable and money-making securities.

"We see, therefore, that the property and rights of the water company belong to the city. While, therefore, the

act recites that it shall be the duty of the water company to furnish water to the public fire cisterns and public fire plugs or hydrants of the city for fire protection, yet this could not have been the consideration that induced the passage of the act, since it made no difference to the city whether a million of dollars or a penny might be paid for this service, because it was the owner of the rights and property of the water company, and it would, therefore, be but a payment to *itself*. It cannot be supposed, therefore, that the legislature intended to relinquish over $10,000 of taxes annually in consideration that the city would not charge *itself* for water furnished by *itself*.

"It is useless to inquire why the act declares that the water company should furnish water to the city free of charge. Perhaps, as suggested by counsel, it was merely to avoid the trouble of keeping an account between the sinking-fund department and the city proper. The reason which induced the attempted granting of the exemption must, therefore, have been, as indeed the act recites, that the sinking fund of the city, or, in other words, the city itself, owned all of the water-company stock." (Court's italics.)

The act of exemption being a mere gratuity and not a contract, the Constitution of the United States affords no protection against the repeal of the act.

CONCLUSION.

We maintain:

I. That this Court has no jurisdiction because no law has been passed impairing the obligation of the alleged contract or purporting to in anywise affect the act of exemption, the real ground of complaint being that the State court held the act of exemption to be in conflict with the State constitution.

II. If the subsequent law be held to repeal the act of exemption so far as the tax in controversy is concerned, then there was a power of repeal.

III. That the act of exemption does not constitute a contract, and therefore a Federal question is not presented.

We therefore respectfully submit that the writ of error should be dismissed or the judgment should be affirmed.

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HELM BRUCE,
Counsel for Defendant in Error.

AUTHORITIES CITED.

Clark *vs.* Louisville Water Co., 90 Ky., 515.
Louisville Water Co. *vs.* Kentucky, 143 U. S., 1.
Hamblin *vs.* Western Land Co., 147 U. S., 532.
New Orleans Water Works *vs.* La. Sugar Co., 125 U. S., 30.
Central Land Co. *vs.* Laidley, 159 U. S., 109.
New Jersey *vs.* Yard, 95 U. S., 114.
Gordon *vs.* Winchester, &c., 12 Bush, 114.
Louisville Gas Co. *vs.* Citizens' Gas Co., 115 U. S., 694.

APPENDIX.

I.

HEWITT ACT OF MAY 17, 1886 (1 ACTS 1885–'86, PAGE 140).

Article 1, section 1. "That an annual tax of forty-seven cents upon each one hundred dollars of value of all real and personal estate directed to be assessed for taxation, due and payable the fiscal year assessed, shall be paid by the owner or person assessed."

Art. 12, sec. 7. "That this act shall take effect from and after September 14, 1886; but it shall not operate as a repeal of existing laws as to any assessment made, licenses granted, or obligations or penalties incurred under any existing law."

II.

ACT OF MAY 22, 1890 (1 ACTS 1889–'90, PAGE 158).

SECTION 1. "That section one of article one of an act entitled 'An act to amend the revenue laws of the Commonwealth of Kentucky,' approved May seventeenth, one thousand eight hundred and eighty-six, be, and the same is hereby, amended so as to substitute for the word 'forty-seven,' in the first line, the word 'forty-two,' and for the word 'twenty,' in the seventh line, the word 'fifteen.'

SEC. 2. "This act shall take effect from and after its passage."

"Became a law, the objections of the governor to the contrary notwithstanding, May 22, 1890."